Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Area in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool	)	PR Docket No. 89-553
	)	
Implementation of Section 309(j) of the Communications Act — Competitive Bidding	)	PP Docket No. 93-253
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252

COMMENTS OF
RAM MOBILE DATA USA LIMITED PARTNERSHIP

RAM Mobile Data USA Limited Partnership ("RMD") hereby submits the following comments with respect to the Second Further Notice of Proposed Rule Making (the "Second Notice") in the above-captioned proceeding.

I. AUCTION RULES FOR 900 MHZ SMRS NEED TO BE ESPECIALLY TAILORED TO TAKE INTO ACCOUNT THE PRESENCE OF EXISTING SYSTEMS.

The presence of so many existing 900 MHz SMR systems that cannot be relocated and that need to expand makes the auctioning of 900 MHz SMR blocks[1] fundamentally different from any other auction that the Commission has thus far held or considered. In effect, the 900 MHz SMR auctions will be the Commission's first experience in an "odd lots" auction. This fundamental difference must be

[1] RMD has opposed -- and continues to oppose as contrary to statute, legislative intent, and sound communications policy -- the use of auctions to license the operation of interstitial areas on 900 MHz SMR frequency blocks on which there are already existing operations. For the record, RMD's arguments on this subject are found in its comments in related 900 MHz SMR proceedings and are incorporated herein by reference. See, e.g., Comments and Reply Comments of RMD, PP Docket No. 93-253, submitted, respectively, November 10, 1993 and November 24, 1993. For better or worse, RMD understands that the focus of this proceeding is not whether incumbent frequencies will be auctioned, but the preferences and procedures that will be employed to do so, and focuses its comments accordingly.

taken into account in developing auction rules and, more particularly, in determining whether, how much, and how to apply bidding credits.

II. BIDDING CREDITS SHOULD NOT APPLY TO FREQUENCY BLOCKS IN MTAS UPON WHICH SYSTEMS ARE ALREADY OPERATING.

A. Arbitrage Should Not Be Encouraged.

If the Commission determines to auction incumbent blocks, it should not provide bidding credits to non-incumbents for such blocks. Allowing bidding credits on blocks needed by existing systems for expansion would be an open invitation to "greenmail." The long and difficult history of the Commission's efforts to prevent speculators from profiting on the sale of unbuilt frequencies to those who can make use of them is strong witness to the fact that the current rules against unjust enrichment will not prevent speculators from extracting consideration for MTA licenses that they may purchase at less than full value.

What is involved is more than an issue of re-distribution of wealth to a favored class of bidders. By inviting greenmail and dubious management agreements, capital that otherwise could be invested in communications infrastructure must instead be used to pay off speculators. Innovative and expanded services will continue to be delayed while these transactions are negotiated and arranged. Worse, such services, which already have been placed at a tremendous competitive disadvantage because of past licensing delays vis-a-vis 800 MHz SMR and cellular — services with access to far more spectrum than 900 MHz SMR — may not develop at all.

The prospect of inviting speculative applications, relying on the marketplace to sort it out, and ending up with little or no service to the public is not one that the Commission can disregard. Indeed, in many ways, this is precisely what happened to 900 MHz SMR before when thousands filed speculative applications with the hope that those actually interested in building a system would buy them from them, and most frequencies in most markets went unconstructed.

Furthermore, allowing bidding credits on incumbent frequencies raises underlying questions about the purpose of such auctions at all. Throughout the debate about whether or not incumbent frequency blocks even should be subject to auction, a constant issue has been whether anyone truly interested in building and

operating its own system, other than the existing licensee, would bid on frequency blocks in MTAs where most of the area has already been built by the incumbent and therefore would not be available to a new entrant. RMD and others have argued that the interstitial areas are such that no *bona fide* system could be built with what is left, that anyone bidding would almost surely do so with ulterior motives, and that, therefore, auctions should not be held. The response has been, "you may be right but we should have an auction to find out." By extending bidding credits to non-incumbents, however, the equation is skewed. The Commission is, in effect, inviting those who have no interest in building a system to bid just for arbitraging the difference between what they have to pay and what the incumbent would.

RMD urges that, whatever the benefits that are hoped to be derived from auctions, encouraging such arbitrage in Commission licenses is not one of them. It should be recognized, moreover, that the higher the bidding credit available to a non-incumbent, the greater will be the incentive for arbitrage. Accordingly, while as discussed below, RMD urges that there are other reasons to keep bidding credits low, this is vital as to bidding on encumbered blocks.

B. Incumbent Systems Should Not Be Disadvantaged Vis-a-vis New Entrants In Seeking MTA Authorization Necessary To Complete Their Networks.

On numerous occasions, both before and after the Commission was granted auction authority, it determined to give existing licensees a first opportunity to seek expansion frequencies. In doing so, the Commission recognized the public interest in allowing existing networks to be completed to ensure the rapid provision of high quality communications services to the public.[2]

While these precedents apparently have not been sufficient, in the Commission's judgment, to persuade it not to auction frequencies upon which existing 900 MHz SMR systems operate, RMD urges the Commission at least to take a second look at these cases to consider whether they or the public interest reasoning that they represent can be squared with establishing a system of bidding credits under which new entrants would be given preference over existing systems in

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[2] See, e.g., Report and Order, 8 FCC Rcd 8318 (1993) (incumbent private carrier paging operators given opportunity to secure channel exclusivity on regional or nationwide basis); and, Second Report and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd. 3340, 3342 (1992) (local broadcasters given first opportunity to implement advanced television service).

bidding for licenses to serve interstitial areas in which existing systems already operate. RMD urges that they cannot.

C. Bidding Credits On The Least Encumbered Blocks Is Better Than Bidding Credits On All Encumbered Blocks, But Not At The Price Of Increasing The Credit That Would Be Available On Those Encumbered Blocks As To Which Bidding Credits Would Apply.

The Commission asks whether bidding credits should be limited to the least encumbered channel blocks.[3] As a general matter, if it is determined that bidding credits will be available for some encumbered blocks, RMD prefers some to all. To this, however, RMD adds one very important caveat. If the only choice available is between lower bidding credits on all encumbered blocks or higher bidding credits on some encumbered blocks, RMD "prefers" the former alternative, because, as bidding credits increase, the chance that they will be used for arbitrage becomes exponentially higher.

If the Commission determines to make distinctions based upon the degree to which frequency blocks are encumbered, RMD urges that the analysis be done ten-channel block by block in each MTA. The first preference always would be for unencumbered blocks; when necessary, the least encumbered blocks would be those with licensees that have the least, if any, wide area coverage in the MTA. The same group of frequencies probably would not be available for bidding credits in each MTA because in some MTAs some blocks of frequencies will be less encumbered (and in many not encumbered at all) and, in other MTAs, other frequency blocks would be less encumbered.

Although a new entrant might prefer the same group of frequencies in every MTA, going block by block gives bidding credits on relatively more unencumbered spectrum, which should be in the interest of the new entrants. It also allows for less intrusion on existing systems, particularly those that already have shown a commitment to wide-area service. RMD notes in this regard that its own system, which to its knowledge is the only 900 MHz SMR system that operates on a nationwide basis, uses several different blocks, as a result of the manner in which it had to secure frequencies when the system was built.

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[3] Second Notice at ¶ 132.

D. The Statute Does Not Require That Bidding Preferences Be Given On Encumbered Blocks.

In addition to the policy considerations against granting bidding credits to new entrants on encumbered blocks, it should also be made clear that there is no statutory requirement that such credits be granted. Indeed, putting aside the question whether the statute permits auctions in this situation, see note 1 above, there is no requirement that the Commission proceed with auctions on encumbered blocks, instead of allowing existing systems expansion rights as have been granted to other services.[4]

Even taking the decision to auction as granted, the statute only identifies bidding preferences as one of many things for the FCC to consider in designing auctions. 47 U.S.C. § 309(j)(4)(D). If, however, bidding preferences were to be employed, nothing in the statute requires that they be available for all blocks; indeed, in no prior service that has been auctioned have bidding preferences been applied throughout. Second Notice at ¶ 130. Nor is there anything in the statute that suggests that bidding preferences must be or should be applied to frequencies that are already licensed to others.

It should also be recognized that the statute identifies other important goals that must be considered:

(i) "the development and rapid deployment of new technologies, products and services;"

(ii) "avoidance of unjust enrichment;" and

(iii) "efficient and intensive use of the electromagnetic spectrum."

47 U.S.C. § 309(j)(3)(A), (C) and (D).

RMD respectfully submits that none of these goals will be served by adopting rules that encourage bidding by those who have no intention of actually constructing and operating a communications system, but who can make huge profits by "outbidding" an existing system for frequencies that are essential to that system's

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[4] See Discussion at II.B above.

ability to complete its network and then effectively selling the frequencies back at a profit that will roughly equal the bidding preference granted.

III. IF THERE ARE TO BE BIDDING CREDITS, THEY SHOULD BE SMALL (NO MORE THAN 10%) AND LIMITED TO SMALL BUSINESSES.

The limited amount of spectrum allocated to 900 MHz SMR will result in comparatively low values for 900 MHz MTA-based licenses which, combined with the more modest capital requirements associated with constructing a 900 MHz SMR system, warrants a narrow definition of "designated entity" and a reduced designated entity bidding credit. Accordingly, RMD supports the Commission's tentative conclusion to limit bidding credits, installment payments and reduced down payments to "small businesses," defined as entities with less than $3 million in average gross revenues for the preceding three years,[5] and to establish bidding credits at 10%.[6]

RMD agrees with the Commission that the provision of credits and other competitive benefits to small businesses necessarily will encompass the vast majority of women- and minority-owned businesses and, therefore, that it is unnecessary to create independent designated entity status for women- and minority-owned businesses.[7] RMD also notes that the Supreme Court is now reviewing whether certain minority preference programs are unconstitutional (Adarand v. Pena, 115 S. Ct. 41, cert. granted, September 26, 1994), and the U.S. Court of Appeals for the D.C. Circuit has determined already that, in some instances, preferences for women are violative of the Equal Protection clause. Lamprecht v. FCC, 958 F.2d 382 (1992).

While RMD understands that these constitutional issues may require resolution in the courts, RMD believes that where, as here, the FCC has identified non-gender or racial specific classifications that serve those who may need assistance in entering the communications market (including, but not limited to women and minorities), it is the preferable course. It also may, among other things, help to insulate the 900 MHz SMR auction from a Constitutional challenge, thereby accelerating the provision of 900 MHz SMR services to the public and allowing 900

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5 Second Notice at ¶ 135.

6 Id. at ¶ 130.

7 Id.

MHz licensees to attempt to catch-up with those CMRS providers already permitted to offer mobile services on a wide-area basis.

In addressing the racial/gender preferences issue, RMD emphasizes that it is not asking the Commission to make 900 MHz SMR the battleground for this highly charged issue. For the reasons discussed above, the nature of 900 MHz SMR, the presence of so many existing systems, the limited amount of spectrum available, and its uncertain value all serve to make it the wrong place to give anyone high bidding credits and the wrong place to make too many distinctions among categories of preferred bidders. Moreover, the licensing of 900 MHz SMRs, delayed for so long, and seemingly always caught up in larger policy debates about lotteries, regulatory parity, auctions, nationwide versus local systems, and the like, should not further be delayed by yet another "larger" issue. As noted above, the statute does not require that bidding preferences be given at all; it certainly does not require that they be gender or racially based; and it does not require them here.

IV. A BIDDER SHOULD ONLY BE ELIGIBLE TO BID ON BLOCKS LISTED IN ITS FORM 175 AND FOR WHICH IT MADE AN UPFRONT PAYMENT.

The unique nature of the 900 MHz SMR landscape, discussed above, makes the MTA blocks that will be subject to auction not a fungible commodity. For this reason, RMD supports the Commission's tentative conclusion to require each prospective bidder to identify in its Form 175 the markets and frequency blocks for which it is applying,[8] and to make an upfront payment equivalent to $0.02 per MHz-pop based on the number of 10-channel blocks identified in the Form 175.[9]

These requirements, however, appear to be at odds with the statement in the Second Notice that bidders can bid on any combination of licenses provided that the total MHz-pop combination does not exceed the amount covered by the upfront payment,[10] which suggests that a single upfront payment could make a bidder eligible for multiple frequency blocks in multiple markets. In addressing this apparent contradiction, RMD urges the Commission to clarify that an applicant is only allowed to bid on channel blocks identified in its Form 175 and for which the requisite upfront payment has been made. Doing otherwise invariably would

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8 Second Notice at ¶ 103.

9 Id. at ¶ 107.

10 Id.

overstate the extent of mutual exclusivity (as an applicant could make itself eligible for every license simply by identifying each license up for auction in its Form 175 and then making an upfront payment sufficient to cover one license in the most populous MTA) and, therefore, would defeat the Congressional directive to the Commission to seek to avoid mutual exclusivity.

V. THE COMMISSION SHOULD MAKE CLEAR THAT PROVIDING INFORMATION ABOUT EXISTING SYSTEMS DOES NOT CONSTITUTE COLLUSION.

The Commission has indicated that it will put contact information for existing systems in its bidding packet to help potential new entrants to ascertain the extent to which there may still be room (or not) on a particular frequency block in a particular MTA to construct an independent system.[11] RMD believes this is a sensible approach, but wants to be sure to avoid any charge that by providing such information there is any bidding collusion. Accordingly, while it surely cannot be the intent, RMD asks the Commission in its decision in this docket simply to clarify that a licensee's good faith effort to supply such information does not constitute collusion.

VI. CONCLUSION: EXPEDITED ACTION IS NECESSARY.

The failure to proceed with Phase II of the 900 MHz SMR licensing process has left existing licensees in limbo for over five years, reluctant to build-out their current systems for fear of ultimately losing the substantial investment associated with such construction. Now, with other CMRS services already licensed on a wide-area basis, the need to proceed with such licensing for 900 MHz SMR systems is critical. Accordingly, quick action on this yet another further notice of rule making regarding 900 MHz SMR licensing is urgently requested.

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[11] Id. at ¶ 102.

Phase I 900 MHz SMR licensing began in 1986. The consideration of Phase II SMR licensing, which was to have followed the completion of Phase I, began in 1989. It is now 1995. Somehow, with due consideration for what has gone on before, it is time to proceed.

Respectfully submitted,

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May 24, 1995